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No. 86-1829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

BRIEF OF SEATRAIN LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in requiring the Secretary of Transportation to explain how her abrupt reversal of a long-standing maritime policy was consistent with the United States maritime laws.

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly-owned subsidiaries) or affiliates of respondent Seatrain Lines, Inc.: Tenafly Holdings, Inc.; Richmond Tankers, Inc.; Queensway Tankers, Inc.; Bay Tankers, Inc.; East River Steamship Corp.; and Kingsway Tankers, Inc.

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STATEMENT OF THE CASE

This brief is submitted in opposition to the Petition for a Writ of Certiorari submitted by Atlantic Richfield Company ("ARCO"), an intervening defendant in this case. Neither the Secretary of Transportation, the original defendent, nor American Petrofina, Inc., the other intervening defendant, has filed such a petition.

Background

The statutory framework governing the United States merchant fleet divides that fleet into two segments: (1) the so-called "Jones Act" fleet, consisting of American-built, unsubsidized vessels operating in the U.S. domestic trade; and (2) the subsidized fleet,

consisting of vessels built with construction differential subsidies ("CDS") and run with operating differential subsidies, which are generally restricted to the foreign trade. *See* 46 U.S.C. § 883 (1982); 46 U.S.C. § 1156 (1982). In 1980, this Court held that the Secretary of Commerce had the authority to permit a subsidized vessel owner to repay the unamortized portion of its CDS and thereafter enter the domestic trade on a permanent basis. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980).[1] While upholding the Secretary's authority to permit CDS repayment in an appropriate case, however, the Court did not undertake to define the circumstances under which CDS repayment should be allowed.[2]

Until the promulgation of the CDS payback rule at issue in this case, CDS repayment had been approved only "in very special circumstances." H.R. Rep. No. 92-688, at 10 (1971), quoted in *Seatrain Shipbuilding Corp.*, 444 U.S. at 596. After this

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[1] The Secretary of Commerce's authority over the merchant marine was transferred to the Secretary of Transportation in 1981. 95 Stat. 151. This Brief uses the word "Secretary" to refer to the responsible official at the relevant time.

[2] Indeed, the Court explicitly stated that it "express[ed] no view upon the merits of the Secretary's particular exercise of discretion" in permitting CDS repayment in that case by Seatrain's vessel, the STUYVESANT. 444 U.S. at 597. The STUYVESANT was permitted to repay CDS upon findings that it was a financially distressed vessel without opportunities in the foreign trade, that failure to allow repayment would jeopardize the continued operation of Seatrain and the financial interest of the government as guarantor of Seatrain's obligations, and that repayment would not have any significant adverse competitive effect upon vessels in the domestic trade. *Id.* at 577; T.T. STUYVESANT, Docket No. A-124 (U.S. Maritime Administration, Jan. 6, 1978).

Court's decision in the *Seatrain* case, the Maritime Subsidy Board ("MSB") proposed a general rule that would have permitted CDS repayment only upon a showing of four specific "exceptional circumstances"—(1) the absence of favorable opportunities in the foreign trade for a protracted period; (2) consequent inability of the owner to make required principal and interest payments on debt guaranteed by the government, and imminent bankruptcy of such party; (3) consequent financial loss to the government; and (4) likely absence of any significant adverse competitive effect on other vessels already operating in the domestic trade. 45 Fed. Reg. 29610, 29611 (1980). In later promulgating an interim rule, the MSB declared that it would require a showing of "exceptional circumstances," but "exceptional circumstances" were defined more loosely than in the proposed rule. Instead of requiring all four findings required in the proposed rule, the interim rule required the first finding and declared that other enumerated factors would be "consider[ed]" in determining whether "exceptional circumstances" exist. 45 Fed. Reg. 68393, 68394 (1980).

Operators of vessels in the domestic fleet complained that the interim rule was not sufficiently restrictive of CDS repayment, and in *Independent U.S. Tanker Owners Committee ("ITOC")* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982), the court of appeals invalidated the interim rule. While the court found no substantive fault with the rule's discretionary and flexible "exceptional circumstances" standard, it held that the MSB had failed to provide an adequate statement of its reasons for rejecting the more rigid rule that had been proposed. *Id.* at 918-20.

Although the problem identified by the court of appeals was the MSB's failure to explain why it had rejected a more rigid rule limiting CDS repayment, the Secretary's response on remand was to go to the opposite extreme. She proposed and adopted a blanket repayment rule that abandoned the long-standing policy of limiting CDS repayment to exceptional cases, and permitted all CDS tankers to repay their CDS and enter the domestic trade within a one year period ending on June 6, 1986. Notice of Proposed Rulemaking, 48 Fed. Reg. 4408 (1983); Final Rule, 50 Fed. Reg. 19170 (1985), codified at 46 C.F.R. § 276.3 (1986). Three vessels repaid their CDS pursuant to this blanket rule. Two are owned by the petitioner, ARCO, and one is owned by American Petrofina, Inc., also a party to this case.

The Decision Below

The new CDS repayment rule was immediately challenged by U.S. shipowners (including Seatrain Lines, Inc.) who were concerned, among other things, that blanket CDS repayment would have an adverse competitive impact on the existing domestic fleet. The U.S. Court of Appeals for the D.C. Circuit agreed with plaintiffs that the rule should be invalidated for two related reasons: (1) the Secretary had failed to explain how the policy considerations upon which she had relied were consistent with the express goals of the Merchant Marine Act, 1936, 46 U.S.C. § 1101 *et seq.* (1982); and (2) she had failed to explain why a number of regulatory alternatives that might better have served the goals of the Act had been rejected. Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 10a-15a.

When the blanket repayment rule was promulgated, the Secretary of Transportation explained that it was based upon her desire to promote "economic efficiency," "increased competition," and "deregulation." Pet. App. 12a. Circuit Judge Bork, writing for the court of appeals, noted:

> The central thrust of her approach, quite obviously, is to subject the Merchant Marine fleet to the discipline of the free market. . . . This policy may well be defensible, yet it is not among the objectives specified in the Act . . . .

Pet. App. 12a.

The court of appeals expressly noted that it took "no position on whether these policies [of competition and deregulation] can be squared with the Act." Pet. App. at 14a. But the court was troubled by the Secretary's reliance upon such "non-statutory criteria," and unwilling to accept without further explanation the conclusion that a rule based upon those criteria promoted the goals of the Act. The court observed:

> In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute. Her failure to link these non-statutory criteria with Congress' stated objectives in the Act thus makes it impossible for us to uphold the Secretary's decision to reject other measures and adopt this rule in response to the current problems of the merchant marine fleet. Her reliance on these non-statutory criteria is consistently a

> key point in her justifications for adopting this rule. In order to defend this action as "reasoned decisionmaking," the Secretary must spell out in more detail how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area.

Pet. App. 14a.

To give the Secretary an opportunity to justify, revise, or withdraw the rule at her discretion, the court of appeals stayed its mandate for six months, stating that the ultimate result would depend on the Secretary's actions in the interim. Pet. App. 15a.

Subsequent Developments

On June 22, 1987, the Maritime Administration ("MarAd") adopted a revised rule, under which the three vessels that took advantage of the blanket repayment rule would remain in the domestic trade.[3] On April 23, 1987, prior to MarAd's adoption of the revised rule, the House of Representatives passed a measure expressly prohibiting the use of any appropriated funds "to propose, promulgate, or implement any rule or regulation . . . with respect to the repay-

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[3] 52 Fed. Reg. 12199 (1987). The revised rule, like the 1985 blanket rule, would also authorize the continued operation of a fourth vessel, Seatrain's BAY RIDGE, in the domestic trade. The BAY RIDGE was admitted to the trade pursuant to the 1980 interim rule, which was invalidated in *ITOC* v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982). The BAY RIDGE was allowed to continue operating in the domestic trade pending the completion of proceedings on remand. *Id.* at 931.

ment of construction differential subsidy," or to conduct any other proceeding with regard to the three vessels that repaid their CDS pursuant to the rule invalidated by the court of appeals. This provision was approved by the full Congress after adoption of the revised rule, and was signed into law by the President on July 11.[4]

Petitions have been filed with MarAd seeking reconsideration of the revised rule on the ground, among others, that Congress has prohibited its implementation. Litigation has also been commenced challenging the revised rule.

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[4] Section 505 of the Supplemental Appropriations Bill, 1987, Pub. L. 100-71, provides as follows:

> None of the funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administrator for purposes of administering the Merchant Marine Act, 1936, as amended (46 U.S.C. § 1101 et seq.) shall be used by the United States Department of Transportation or the United States Maritime Administration to propose, promulgate, or implement any rule or regulation, or, with regard to vessels which repaid subsidy pursuant to the rule promulgated by the Secretary May 3, 1985 and vacated by Order of the U.S. Court of Appeals for the D.C. Circuit January 16, 1987, conduct any adjudicatory or other regulatory proceeding, execute or perform any contract, or participate in any judicial action with respect to the repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act, 1936, as amended: *Provided,* That such funds may be used to the extent such expenditure relates to a rule which conforms to statutory standards hereafter enacted by Congress.

REASONS FOR DENYING THE WRIT

The court of appeals based its decision upon firmly established principles of administrative law, which do not warrant review by this Court. As this Court has emphasized, "an agency must cogently explain why it has exercised its discretion in a given manner," [5] and "[i]n reviewing that explanation, [a court] must 'consider whether the decision was based on a consideration of the relevant factors.' " *Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48, 43, (1983) (hereinafter "*State Farm*"), quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[6] The court of appeals held simply that the Secretary's explanation for her action did not demonstrate that it was based upon the relevant factors identified in the applicable statute, the Merchant Marine Act, 1936. As the court noted: "The Secretary's statement of basis and purpose fails to give an adequate account of how the payback rule serves these [explicit statutory] objectives . . . ." Pet. App. 10a.[7]

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[5] In the context of informal rulemaking, this principle has an explicit statutory foundation—the requirement that agencies "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 533(c) (1982).

[6] *See also Bowen* v. *American Hospital Association*, —— U.S. ——, 106 S. Ct. 2101, 2112-13 (1986) and cases cited therein; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

[7] These objectives are enumerated in 46 U.S.C. § 1101. They include the development of a merchant marine that is (1) sufficient to carry a substantial portion of U.S. domestic and foreign commerce at all times; (2) capable of serving as

The thrust of ARCO's petition is that the court of appeals has imposed a novel and burdensome requirement, by insisting that the Secretary explain how the payback rule serves the objectives of the Merchant Marine Act, 1936. But that requirement can hardly be characterized as novel or burdensome. There is no more basic principle of administrative law than the requirement that an agency explain how its action conforms to its statutory mandate.[8] Indeed, ARCO itself quotes the fundamental principle at issue in this case: an agency's "record of its action [must be] such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed." Petition ("Pet.") 9, quoting *Opp Cotton Mills, Inc.* v. *Administrator of Wage and Hour Division*, 312 U.S. 126, 144 (1941).

In this case, the court of appeals found itself unable to determine whether the Secretary's action "conformed to the standards which Congress has prescribed." *Ibid.* The Secretary, the court explained, gave only "cursory" attention to those standards, Pet. App. 10a, and relied instead upon "non-statutory criteria" without explaining how those criteria "can be squared with the statutory objectives that

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an emergency naval auxiliary; (3) composed of the best-equipped, safest, and most suitable vessels; and (4) supplemented by efficient facilities for shipbuilding and repair.

[8] *See, e.g., Bowen* v. *American Hospital Ass'n*, 106 S.Ct. at 2112-13; *State Farm*, 463 U.S. at 43; *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806-08 (1973).

Congress specified as the primary guidelines for administrative action in this area." Pet. App. 14a.[9] The absence of such an explanation was not a mere technical deficiency. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ." *State Farm*, 463 U.S. at 43. It necessarily follows that reliance on "non-statutory criteria" must be accompanied by an explanation of their consistency with the Congressional mandate.[10]

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[9] ARCO does not base its Petition on the argument that the criteria relied upon by the Secretary are in fact consistent with the objectives of the Act. The court of appeals took "no position" on that question, and left it open for the parties and the Secretary to consider on remand. The Petition is based instead on the contention that the Secretary need not explain how her action was consistent with the Act.

[10] Contrary to ARCO's suggestion, there is no inconsistency between the D.C. Circuit's criteria for assessing an agency's statement of basis and purpose and those identified by other circuits. Indeed, the very cases cited by ARCO show that other circuits apply the "arbitrary and capricious" standard using the same fundamental criterion applied in this case: has the agency provided a contemporaneous analysis of how its action comports with the statutory factors? *See South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 882-85 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984) (Secretary of Agriculture did consider statutory factors); *id.* at 886 (Secretary set forth how proposed rule will serve those factors in statement of basis and purpose); *United States* v. *Garner*, 767 F.2d 104, 115-23 (5th Cir. 1985) (regulation held arbitrary and capricious where agency failed to set forth contemporaneous statement of basis and purpose); *id.* at 116 (*citing State Farm*, 463 U.S. at 43, and numerous recent D.C. Circuit cases); *Sierra Club* v. *Clark*, 755 F.2d 608, 612-19 (8th Cir. 1985) (remanding to district court to assess whether agency statement of basis and purpose was arbitrary and capricious for not addressing statutory factors).

ARCO also argues that the court of appeals has imposed a new requirement that an agency explain why alternative measures were rejected. But the court of appeals did not hold, as ARCO states, that an agency must always "explain why the rule [it adopts] was not rejected in favor of other rules that might have been proposed." Pet. 7. The court simply concluded that the "Secretary's failure to link the policies served by this rule to the objectives set out in the Merchant Marine Act is particularly problematic because she does not explain . . . why she rejects proposed alternatives to the payback rule." Pet. App. 13a. In other words, the absence of an explanation why alternatives were rejected was not an independent ground for the court of appeals' decision. It compounded the problem that was created by the Secretary's failure to link the rule to the objectives of the Act in the first place.

The inadequacy of the Secretary's explanation for her action in this case was striking, given the abrupt change of course upon which she was embarking. As noted above, CDS repayment had historically been limited to cases in which "exceptional circumstances" could be shown to justify repayment. See pp. 2-3, *supra*. And a critical factor in determining whether repayment by a particular vessel would be allowed was whether the demand for additional tanker tonnage in the domestic fleet was sufficient to accomodate the vessel without an adverse impact upon vessels already in the trade. See *ITOC* v. *Lewis*, 690 F.2d at 914-15; 45 Fed. Reg. 68393, 68394 (1980) (interim rule). In adopting the rule at issue in this case, the Secretary abandoned the requirement of "exceptional circumstances," and substituted a blanket rule that permitted CDS repayment by any ves-

sel regardless of the impact on the existing domestic fleet.[11]

This Court has emphasized that an agency has a "duty to explain its departure from prior norms." *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973). *See also Bowen* v. *American Hospital Association*, —— U.S. ——, 106 S.Ct. 2101, 2122 n.34 (1986); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 n.11 (1979), *citing General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976). The "presumption from which judicial review should start . . . is . . . *against* changes in current policy that are not justified by the rulemaking record." *State Farm*, 463 U.S. at 42 (emphasis in original). "An agency's view of what is in the public interest may change . . . . But an agency changing its course must supply a reasoned analysis." *Id.* at 57. That is all the court of appeals required.[12]

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[11] As the Secretary acknowledged, the economic analysis supporting the blanket repayment rule

> "differ[ed] significantly from previous economic analyses prepared by MarAd concerned with CDS repayment. Instead of assessing the prospects for a mathematical balance of demand and supply of . . . tanker capacity, this analysis focuses on the economic impact of tankers likely to be scrapped if CDS repayment is allowed . . . ."

Notice of Proposed Rulemaking, 48 Fed. Reg. 4408, 4427 (1983).

[12] Petitioner here, like those in *State Farm*, "invoke[s] [this Court's] decision in *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc.*, 435 U.S. 519 (1978) as though it were a talisman under which any agency decision is by definition unimpeachable." *State Farm*, 463 U.S. at 50. In fact, the court of appeals' decision, like

In sum, the court of appeals' decision was consistent with the most fundamental principles of administrative law. It presents no conflict with decisions of this Court or other courts of appeals, and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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that of this Court in *State Farm*, avoids imposing specific procedures on the agency, while requiring a "reasoned analysis" for a change in policy. *See State Farm*, 463 U.S. at 50-51, 57.